IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The government's brief in opposition to the petition for certiorari is a second desperate attempt to avoid review by this Court of an indictment which never should have been returned, a trial which never should have been held, and a conviction which the government now substantially admits is based upon evidence which does not establish petitioner's guilt. The first attempt—the hurried new indictment and the motion for leave to dismiss the pending earlier indictment—failed when this Court denied the government's motion on December 11, 1951.

The government's actions speak with far more force than the words of their brief in opposition. By reindicting petitioner for relatively insignificant statements at

his trial (while omitting from the reindictment his oft-repeated denial of membership in the Communist Party) and by seeking a dismissal of the first indictment, the government confessed in action the very wrong done petitioner which it denies in words. Under these circumstances, "the public trust reposed in the law enforcement officers of the Government" (*Young* v. *United States*, 315 U. S. 257, 258 (1942)) would ordinarily have evoked a confession of error in law as well as in fact. Yet, because such a confession of error might have interfered with the government's determination to press its proceedings against petitioner regardless of any action of this Court,* the government has refused to carry out its public trust and its duty to this Court. Instead the government seeks to avoid a review in this Court on the grand jury improprieties by raising unfounded objections to the state of the record (see I *infra*); and on the merits by making contentions completely inconsistent with their earlier admissions in an effort to withstand the force of petitioner's plea for the direction of a judgment of acquittal (see Statement and II *infra*).

Statement

Under the heading "Statement" the government purports to summarize what it describes as "the salient evidence for the Government" on the issue of whether

* The attention of the Court is invited to the government's statement to this effect when seeking to dismiss the first indictment: "No public interest and no genuine interest of petitioner will be served by continuing the present proceedings. He will have to undergo the burden of a trial on the new indictment whether the first indictment is dismissed voluntarily by the Government or on the merits by order of this Court, or whether this Court directs an acquittal." (Memorandum for the United States in Reply to Petitioner's Response to the Government's Motion for Leave to Apply to the District Court for Leave to Dismiss the Indictment, Dec. 1951, hereafter referred to as "Government's Memorandum," p. 15.)

petitioner "well knew and believed" his denial of membership in the Communist Party to be false.

In that summary the government lists seven items as the evidence in the record establishing that petitioner was a member of the Communist Party: (1) that in 1937 petitioner attended closed Communist Party meetings; (2) that in 1937 he attempted to recruit members for the Communist Party; (3) that in 1937 he had access to a post office box allegedly restricted to Party members; (4) that in 1938 he had on two occasions made statements to the effect that he was or had been a member of the Communist Party; (5) that in 1938 he had been active in the Young Communist League; (6) that in 1942 and 1943 he had paid Communist Party dues; and (7) that in 1942 and 1943 he had given secret information to Miss Bentley.

We respectfully suggest that it is pertinent to compare this summary with the directly contradictory statements which the government made in this Court regarding most of the very same evidence only thirty days earlier in replying to petitioner's contention that he would be prejudiced by a dismissal of the indictment at this time because he was entitled to an acquittal. In its reply memorandum filed in this Court on December 5, 1951, the government asserted that petitioner had "no genuine interest" in continuing the present proceeding because an acquittal on the charge that he had lied when he denied ever having been a member of the Communist Party would not constitute *res adjudicata* as to any of the five factual items forming the basis of the new indictment,* saying (Government's Memorandum pp. 8-9, 10-11):

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* The new indictment is set forth in Appendix A of "Response by Petitioner to Motion by the United States for Leave to Apply to the District Court for Leave to Dismiss the Indictment," pp. i-v.

"* * * Thus, even if petitioner were acquitted of the charge of perjury in having testified before the grand jury that he had never been a member of the Communist Party, such acquittal would not bar his prosecution for committing perjury at his trial in testifying that he had not attended Communist Party meetings, paid Party dues, or asked others to join the Party, that he had not been a member of, or associated with, or aware of the existence of, the Young Communist League at Dartmouth College, and that he had not given anyone not entitled thereto information to which he had access as a government employee."

* * * * *

"Here, no one of the false statements charged in the second indictment, with the possible exception of that relating to payment of Party dues,* could be regarded as having been determined favorably to the petitioner by an acquittal on the earlier charge that he had falsely denied membership in the Communist Party. For example, such an acquittal is not a determination that petitioner never knowingly attended Communist Party meetings. Clearly, attendance at Communist Party meetings is no more precluded by non-membership in the Party than observing a beating is precluded by a determination that the observer did not aid and abet the beating. One might attend meetings for curiosity's sake, or to gain information, or on the invitation of a friend. Similarly, petitioner could have had knowledge of the existence of the Young Communist League at Dartmouth College, or even have associated with it, without having been a member of the Party. And he could have given away secret

* Obviously, if petitioner was not a member, he did not pay "Communist Party dues" as alleged in the second indictment. However, as we think we have clearly shown at pages 44 to 46 of the Petition, the evidence in this record of payments to Bentley does not establish that petitioner was a member of the Communist Party.

> information for many reasons (*e.g.*, for money) unrelated to membership in the Communist Party. * * *"

It is somewhat startling to find the government now listing these very same items among "the salient evidence for the Government" on the issue of whether or not petitioner had been a member of the Communist Party. But of course, having failed in its efforts to avoid the necessity of meeting this issue on the merits, the government had no choice short of admitting petitioner's innocence, for there is no other competent or probative evidence in the case. The only other evidence of membership listed by the government in its "summary" are the petitioner's access to an alleged Communist Party post office box, and the testimony of two witnesses that in 1937-8, when petitioner was a junior at college, he had told them that he was or had been a member of the Communist Party.

As we have amply demonstrated at pages 46-7 of the Petition, the contention that the post office box was a Party box is based on the purest hearsay. In any event, Crouch's testimony that by "a very strict rule" the box was limited to Party members (R. 924) would seem no more "probative" of Party membership than evidence of a rule that the engineer must blow his whistle is proof that he did so on a particular occasion, particularly in view of Crouch's earlier insistence that "There was a general looseness" on organizational matters in the South (R. 822), and that "discipline in the South was extremely lax as compared to the rest of the country" (R. 825), "especially in Tennessee" because of the State organizer's "extreme organizational and political looseness" (R. 908). *cf.* 1 Wigmore, *Evidence*, 3rd Ed. 520 (§92), 534 (§102).

As to the alleged prior oral contradictory statements, as the Court of Appeals correctly ruled, they do not satisfy the rules for proof of guilt in a perjury case (Appendix B to Petition, p. vii). Two witnesses, Ann

Remington, petitioner's former wife, and Robb Kelly, a classmate of Remington's at Dartmouth, testified that during his junior year in Dartmouth in 1937-8, he had told them that he was or had been a member of the Communist Party (R. 184, R. 1432-3). Ann Remington's subsequent testimony on five separate occasions that, to her, membership in the Communist Party meant no more than a "state of mind" (R. 200, 202, 206, 283, 294) would seem to dispose of her testimony. Robb Kelly's attempt to remember, thirteen years later, the exact language used by Remington at an undergraduate "bull session" is the best argument in support of the rule relied on by the Court of Appeals. How could Kelly, in 1950, remember whether in 1937 Remington had said "I am a Red", or even "I am a Communist" (either of which he might well have said at that time and under those circumstances), instead of "I am a member of the Communist Party"? (R. 1432-3).

Thus, even if all the "facts" recited by the government were established by the evidence, there would still be no evidence in this case inconsistent with petitioner's innocence.

But before leaving the subject of the government's "Statement" we do not wish by our silence to create the impression that we concede that the evidence in the case does sustain the statement of facts as therein set forth. For example, at pages 4-5, the government seeks to create the impression that the evidence in the record establishes petitioner's regular and continued attendance at Communist Party meetings. What the government fails to point out is that Kenneth Malcombre and his wife, Betty Malcolm, in whose presence all of the alleged meetings are said to have taken place, did not arrive in Knoxville until the middle of June, 1937 (R. 582-3, 472), less than two

weeks before petitioner permanently left Knoxville, on June 28th, 1937 (R. 2483, 1887-8).*

Similarly, at page 8, the government refers to the famous formula for manufacturing rubber out of garbage as "top secret". The affirmative evidence is that this "formula" was never classified either as "top secret", "secret", "confidential", or even "restricted" in accordance with the rules regarding wartime classified information (R. 3536-8, 3566-73, 3582-90, 3636-39, 3675-82). Actually the evidence is quite clear that the entire subject was a well known and commonly discussed joke (R. 2312-5, 3532-43, 3554-3602a, 3629-39, 3666-81), as petitioner has throughout contended. (See also Nelson, "The Arsenal of Democracy", 1946, pp. 299-300).

In many other respects, we believe and shall demonstrate if this petition is granted that the evidence falls far short of sustaining the government's recital. But for present purposes, it is sufficient to point out that it is now abundantly apparent, largely on the basis of the government's own admissions, that the "salient evidence for the Government", even if taken at face value as recited by the government itself, does not sustain the basic charge that petitioner had been a member of the Communist Party. Clearly he is entitled to an acquittal.

I.

The government has wholly failed to respond to petitioner's basic contention that the transformation of a federal grand jury into a vehicle of private prosecution re-

* In view of the stress laid by the government on the evidence regarding these meetings, which is now for the first time advanced as "direct" evidence of membership (Brief, pp. 19-20), we shall deal with it in more detail when discussing "direct evidence", hereafter.

quires the dismissal of an indictment voted by that grand jury.

In petitioner's Response to the Government's Motion to Dismiss (p. 3), we set forth the following summary of the facts upon which we base our contention that the indictment was unconstitutionally procured:

> (1) At the time of the indictment, the foreman of the grand jury, one John Brunini, was collaborating with chief prosecution witness Bentley in the preparation and publication of a book of memoirs (R. 1598-1607), the success of which depended upon the rehabilitation of her credibility through Remington's indictment.
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> (2) The prosecution's case was presented to the grand jury by Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-4), who had previously been Bentley's personal attorney in litigation arising out of her espionage activities (R. 1388-90, 1280-5).
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> (3) One of the first witnesses before the grand jury was Joseph A. Egan, Bentley's present personal counsel, who had represented Bentley in the libel suit brought against her by Remington (R. 1391, 1496) and whose testimony could only have been incompetent and prejudicial since he did not know Remington.
>
> (4) Foreman Brunini and prosecutor Donegan interrogated Remington, during a five-day grilling before the grand jury (R. 2664), on matters many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and Remington as to whether he had ever been a member of the Communist Party (R. 1515-16), and finally indicted him for denying such membership.

The most significant thing about the government's brief in opposition is the failure to deny a single word of this summary* or to answer or even mention petitioner's contention that the grand jury was thus turned into a vehicle of private prosecution contrary to the Constitution and the decided cases (Petition, pp. 22-27). Instead, the government seeks to divert the Court from this basic issue involving the integrity of the judicial process into an inquiry whether petitioner has proved that Brunini had a financial interest (as distinguished from his admitted personal interest) in sending Remington to jail. The attempted diversion is without merit.

Two wholly disinterested witnesses testified for the defense that Brunini did have a financial interest in Bentley's book (R. 1537-1546, 1579-82; 1600, 1610, 1611). Although neither of them had seen the signed contract containing Brunini's financial interest, both of them testified unequivocally that the publishers and Bentley had told them of Brunini's financial interest, and one witness testified to the destruction of the contract (R. 1593-4). Surely, after such accusations are made, petitioner is not required to call the accused persons as his own witnesses, and expect them to publicly confess their own wrongs. The burden of going forward was clearly on the government to call the witnesses, two of them were in the court-

* The government suggests (pp. 14-15) that petitioner has failed to prove the allegations in his affidavit that Brunini and Donegan had grilled him for five days on subjects wholly unrelated to any possible wrongdoing by him and directly related to his public dispute with Bentley. But the government does not deny that the facts stated in the affidavit are true even though they have seen the minutes of the grand jury. In any event, the grand jury minutes were reluctantly sealed into the record by the trial court and are available to this Court, thus removing any question of the adequacy of the record on this point (R. 3132, 3138).

room (R. 1585-1587)* as was Bentley's personal counsel (R. 1495) and the third of whom, Brunini, was certainly available, to contradict the accusation if they could, and subject themselves to cross-examination. This is particularly true since the government refused to produce the "full narrative of these incidents" which it had in its possession (R. 1526-7). The government's statement that, despite the clear evidence in the record, the United States Attorney's office remains of the *opinion* that at no time did Brunini have a financial interest in the book (Brief, p. 16) must be considered in the light of their continued failure to make the "full narrative" available—even now in this Court.

Nor is it important whether Brunini had a binding legal contract setting forth a specified financial percentage in Bentley's royalties, or only an offer of the customary financial interest of any editor which he rejected out of guilt for his own wrongdoing. Brunini was Bentley's unstinting collaborator and his identification with her would be as great in the one case as in the other; the use of the grand jury as a vehicle for private malice would be no different. Indeed, Brunini himself has been more frank about his personal identification with Bentley and her charges than is the government in its opposition; in this connection the Court's attention is respectfully called to Brunini's article in SIGN magazine for September, 1951, entitled, "Smoke Screens for Subversives."

Here, indeed, we have the strongest possible case of the private prosecutor intruding into the grand jury room: a professed but unpunished criminal and her collaborator,

* The government suggests (p. 13) that petitioner should have called the publishers to the stand because he had one of them under subpoena. But the subpoena had been issued to obtain the contract which was substituted for the destroyed one (R. 1495) and which petitioner actually introduced in evidence (Ex. W, R. 1380).

the foreman of the grand jury, together with her past and present counsel, work in the grand jury room to bring about the indictment for perjury of the person who dared to call her a liar. Yet the government avoids this basic issue and talks of "legal qualifications" and Rule 6(b)(2). Petitioner is not objecting to the absence of Brunini's "legal qualifications"; the offense is to the judicial process in the transformation of the grand jury room into a private prosecution. The record being clear and undenied on this point, there is certainly no need for bringing 22 grand jurors into a court of law and asking them whether they were subjected to "undue influence". It is the irresponsible nature of the grand jury rather than proof of actual prejudice which is determinative (Petition, pp. 22-27).

II

The government appears to be in substantial agreement with our contention (Petition, pp. 33-42) that it is necessary in a perjury case to prove that the defendant lied in fact and that the court below erred in holding that such proof is unnecessary. The government relies, in its effort to avoid review by this Court and the acquittal of petitioner, upon the contention that the difference between the correct rule and that laid down by the Court of Appeals "is actually more of phraseology than reality" (p. 20) and that the record contains "direct" evidence of petitioner's membership in the Communist Party.

At the trial, the United States Attorney refused to state what items of proof he contended were "direct" evidence. In the Court of Appeals the government for the first time disclosed the items of evidence which it contended were "direct"—the testimony regarding the

mailbox and the alleged payment of dues (see Petition, Appendix B, p. ix). These items having been shown to be far from "direct" evidence in the petition for certiorari (pp. 44-48), the government has at this late stage in the proceedings added, and now principally relies upon, a third category of so-called "direct" testimony, namely, attendance at meetings.

The government's present position that the testimony concerning attendance at meetings is "direct" evidence of membership is not only inconsistent with the position of the government before the Court of Appeals—where there was no suggestion that the alleged attendance at meetings could possibly be "direct" evidence (Petition, Appendix B, p. x) —but is even inconsistent with the government's memorandum in support of their motion to dismiss filed in this Court only thirty days ago. There, as we have already pointed out, the government flatly stated that "attendance at Communist Party meetings is no more precluded by non-membership in the Party than observing a beating is precluded by a determination that the observer did not aid and abet the beating. One might attend meetings for curiosity's sake, or to gain information, or on the invitation of a friend" (Government's Memorandum, p. 10). Petitioner concurs.

Even now, in its brief in opposition, the government takes an equivocal position on this very question. Although relying primarily on alleged attendance at Communist Party meeting as "direct" evidence, the government admits that "Mere attendance at one or two meetings conceivably might not be considered sufficiently direct since conceivably an outsider might be allowed to attend a closed meeting" (p. 20). But, as we have shown, p. 6, *supra,* the government failed to point out to this Court that the alleged meetings of necessity occurred within the

period of less than two weeks immediately preceding petitioner's permanent departure from Knoxville on June 28, 1937 (R. 2483, 1887-8). Since meetings are usually held every two weeks (R. 717, 777, 473), this would seem to refute any possible contention of "regular" or "repeated" attendance at meetings. The government is thus relying for "direct" evidence on testimony that petitioner attended one or two meetings fifteen years ago when he was 19 years old—testimony which it has in the past and still concedes is not proof of membership at all.*

Petitioner might well let the matter rest there. But, in view of the government's sudden reliance on this "attendance" testimony as "direct" evidence and in view of the misleading presentation in the government's statement of the testimony concerning meetings given by Malcombre, Benson and Bridgman, we set forth their testimony in some detail. We submit that an examination of this testimony will conclusively show that it not only does not satisfy the requirements of "direct" evidence under the perjury rule, but that it is not even probative evidence in any respect.

McConnell was the organizer, who, as we have seen, arrived in Knoxville on or about June 15, 1937, two weeks before Remington left (R. 582). He testified as to a single meeting called at night in a public park, but he had no personal recollection as to how the meeting was called. When asked whether he had personally asked anyone to

* Petitioner's wife swore that during the entire time that she knew him, from the spring of 1938 until long after the period during which he is alleged to have been a member of the Communist Party, they never attended any Communist Party meetings—with the exception of some meetings which she alone attended at Croton, N. Y., while he was still at Dartmouth (R. 437, 296-8, 364).

attend, he replied "I must have told someone because the meeting took place" (R. 596). Although as a section organizer (R. 603) who was his own secretary (R. 677), he was the official who would have issued membership books, collected dues, issued dues stamps, and transfer papers when petitioner left Knoxville (R. 608, 676, 683), he admitted that he had never seen any membership card belonging to petitioner, never collected dues from him, issued stamps (R. 676-7) or issued any transfer papers (R. 683-4). When asked how then he could state that petitioner had been a member of the Party, he replied: "Save by saying that my relations with Mr. Remington were those of fellow * * * members of the Communist Party" (R. 684-5). In other words, McConnell's testimony regarding petitioner's attendance at the meeting was not even considered by him to constitute proof that petitioner was a member of the Party.

McConnell did not corroborate either Benson or Bridgman as to the meetings held at his wife's house, for he testified that he had not attended any meeting at his wife's house (R. 685).

Although Christine Benson testified that she had seen petitioner at Betty Malcolm's house, she refused to swear that he had been a member of the Party, saying, "I haven't stated definitely that I knew him to be a member. I stated definitely that I attended some meetings with him" (R. 496). On two occasions she admitted that it was possible for non-members to attend such meetings (R. 526-8, 536-7).

Bridgman likewise sought to place petitioner at meetings in Betty Malcolm's house, although he did not place Christine Benson at such meetings (R. 717, 770), nor, for that matter, did she place him at such meetings (R. 487-8).

The fact is that Bridgman did not testify that to his knowledge petitioner was a member of the Communist Party or that the meetings were "limited to members". Moreover, before the indicting grand jury, in May and June of 1950, Bridgman had insisted that the meetings which he and petitioner had attended were held at Betty Malcolm's house in the winter or early spring of 1937 (R. 710-717). When he was later recalled before the grand jury, he stated that he could not remember petitioner at any meetings except the "early meetings" at Betty Malcolm's house (R. 947, 947a). When confronted with proof that Betty Malcolm had not arrived until June 17, 1937 (R. 948), he told the grand jury that he was "floored" (R. 950). At the trial on January 3, 1951, he testified that since he had been "floored" by this disclosure seven months earlier, F.B.I. agents had seen him approximately once every week or two weeks in Massachusetts, where he lived, to discuss this discrepancy in his testimony (R. 716, 718, 950) and had even driven him around Knoxville, Tennessee, in September, 1950, in an effort to refresh his recollection (R. 718-20). Yet, even with all this assistance, Bridgman was still unable to reconcile this glaring discrepancy in his testimony.

The recital of the testimony concerning petitioner's alleged attendance at Communist Party meetings conclusively refutes the government's new-found position that this testimony constitutes "direct" evidence of membership. Even more significantly, the recital demonstrates the wisdom of this Court's statement in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 410-411 (1950) that "in proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." Here the government has conceded that it has no evidence that defendant ever committed an act of joining (R. 3970); its

efforts to substitute for such evidence vague testimony concerning one or two meetings held 15 years ago when petitioner was 19 years old illustrates the dangers if the rule laid down by this Court is ignored.

Conclusion

If we are correct in our basic contention, with which the government appears to be at least tacitly in agreement, that it is necessary in a perjury case to prove objective falsity, we submit that on this record petitioner is clearly entitled to a judgment of acquittal. For it must now be apparent, in large part on the basis of the government's own admissions, that this petitioner has been prosecuted and convicted of perjury for denying that he had ever been a member of the Communist Party on the basis of evidence which does not prove that he had ever been such a member. Indeed, in apparent realization of this, the government has sought to avoid meeting the issue on the merits, first, by attempting to drop this indictment, and secondly, by failing to include in the new indictment a charge based on petitioner's denial of membership.

One would suppose, under these circumstances, that the government would freely admit that petitioner was innocent of the crime of which he had been convicted, and join in petitioner's prayer that this Court direct the entry of a judgment of acquittal. Instead, the government has taken the extraordinary position that the defendant is not even entitled to insist upon a judgment of acquittal:

> "No public interest and no genuine interest of petitioner will be served by continuing the present proceedings. He will have to undergo the burden of a trial on the new indictment whether the first indictment is dismissed voluntarily by the Govern-

ment or on the merits by order of this Court, or whether this Court directs an acquittal" (Government's Memorandum, p. 15).

For six years this petitioner has exhausted his resources in seeking to clear his name of the false accusation that he had been a member of the Communist Party. Now that the government substantially concedes that he spoke the truth, it seeks to deprive him of his right to obtain such vindication because, they say, they may be able to put him in jail anyway: while defending himself from the false accusation of having been a member of the Communist Party, he denied various allegations (generally of a relatively minor nature, and on the government's own admission immaterial on the issue of petitioner's guilt or innocence here), as to which the government hopes it may be able to obtain direct contradictory testimony, duly corroborated as required under the perjury rule. No doubt another year of weekly and bi-weekly meetings with the F.B.I. may have helped Bridgman to "remember" further details regarding petitioner's activities in Knoxville fifteen years ago—just as, after the settlement of petitioner's libel suit, Bentley "remembered" many details which she had been unable to recall during previous public testimony (R. 1185-6, 1218, 1226, 1299-1300; for specific instances, *e.g.*, see R. 1214-5, 1198-1200 and 1194, 1185-8).

However that might be, the government has made it quite clear that in its view, as long as it can put William Walter Remington to his trial for something, it is a matter of no importance whether or not he was wrongly convicted of perjury for denying that he had ever been a member of the Communist Party.

We respectfully submit that not only the interests of simple justice to this petitioner, but the public interest

in the proper administration of justice, require that this Court take cognizance of such vindictive persecution. Under civilized standards of justice an innocent man who has been wrongly convicted of a heinous offense, and whose name has been bandied about throughout the length and breadth of the country as something little less than a traitor, is entitled at the very least to judgment of his innocence of that offense.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Counsel for Petitioner.

WILLIAM C. CHANLER,
JOSEPH L. RAUH, JR.,
JOHN K. TABOR,
Of Counsel.